

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION**

IN RE:

CHAPTER 13

**MORRIS L. DIXON
PATRICIA A. DIXON**

CASE NO. 02-00415JEE

**MORRIS L. DIXON AND
PATRICIA A. DIXON**

PLAINTIFFS

VS.

ADVERSARY NO. 02-00219JEE

**ROYCE MCNEAL, BRENT MCNEAL,
BRIAN MICHAEL PELLISSIER,
JAMES R. HALL, CRAIG A. NETTERVILLE,
CREDIT DEPOT CORPORATION OF GEORGIA,
CREDIT DEPOT CORPORATION OF TENNESSEE,
FAIRBANKS CAPITAL CORPORATION, AND
UNIVERSAL TITLE & ESCROW, LLC**

DEFENDANTS

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Corporation

Edward Ellington, Judge

ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on the motion for summary judgment filed by Fairbanks Capital Corporation and the response thereto filed by Morris L. Dixon and Patricia A. Dixon. The Court, having considered the motion, response, the parties' legal memoranda and the attachments thereto, as well as the pleadings, finds for the following reasons that the motion is well taken and should be granted.

On or about January 27, 1998, Morris L. Dixon and Patricia A. Dixon (Debtors) refinanced their home mortgage with Southern Mortgage Company (Southern). As part of the loan transaction, the Debtors executed a deed of trust and a promissory note to Southern. On February 3, 1998, the deed of trust was assigned to the Credit Depot Corporation of Tennessee. At some later date, the deed of trust was assigned to The Chase Manhattan Bank, now known as JP Morgan Chase Bank. JP Morgan Chase Bank, as trustee for IMC Home Equity Loan Trust 1998-3, is the current holder of the Debtors' mortgage loan. In June 2001, Fairbanks Capital Corporation (Fairbanks) began servicing the Debtors' mortgage loan. Subsequent to the filing of the Debtors' complaint, Fairbanks changed its corporate name to Select Portfolio Servicing, Inc. (SPS).

The Debtors filed their voluntary petition for relief pursuant to Chapter 13 of the Bankruptcy Code on January 23, 2002. The Debtors then initiated this adversary proceeding by filing a complaint to determine the validity and extent of the lien on their real property. The original complaint was amended twice. In their second amended complaint, the Debtors assert various state law claims such as predatory lending, conspiracy, and fraud claims against numerous defendants. The Debtors sole claim against Fairbanks, however, is for an accounting.

Fairbanks filed an answer to the complaint and subsequently filed the motion for summary judgment presently before the Court. Fairbanks attached to its motion the Debtors' "Customer Account Activity Statement." In its motion, Fairbanks asserts that it does not hold a lien on the Debtors' property and furthermore, that because it has produced the requested accounting for the Debtors, no issues remain for trial and it should be granted summary judgment and dismissed as a defendant. The Debtors filed their response to the motion contending that Fairbanks has taken inconsistent positions with regard to its interest in the Debtors' property such that a genuine issue of material fact exists for trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the subject matter and the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157.

II.

Federal Rule of Civil Procedure 56, made applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056, states that summary judgment is properly granted only when, viewing the evidence in the light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Rule 56(e) further provides, in relevant part:

When a motion for summary judgment is made and supported as provided in this

rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Fed. R. Civ. P. 56(e).

Thus, the moving party bears the initial responsibility of informing the court of the basis for its motion, and of identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323, 106 S.Ct. at 2552-53. Once the moving party has made its required showing, the nonmovant must go beyond the pleadings and by its own affidavits or by depositions, answers to interrogatories, and admissions on file designate specific facts showing a genuine issue for trial. Celotex, 477 U.S. at 324, 106 S.Ct. at 2553. To defeat a properly supported motion for summary judgment, the nonmovant must adduce affirmative evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257, 106 S.Ct. 2505, 2514-15, 91 L.Ed.2d 202 (1986). The nonmovant cannot rely upon the theoretical possibility that its claim is valid. Pennington v. Vistrion Corp., 876 F.2d 414, 426 (5th Cir. 1989). The evidence introduced by the nonmovant in response to a motion for summary judgment must have significant probative value. Anderson v. Liberty Lobby, 477 U.S. at 249-50, 106 S.Ct. at 2510-11. The mere existence of a scintilla of evidence is insufficient. Id., 477 U.S. at 252, 106 S.Ct. at 2512.

III.

In their second amended complaint, the Debtors state the following:

- ¶ 14 Fairbanks asserts a lien interest in the subject property but was not a participant in the facts set forth below. No relief is sought against Fairbanks for the cancellation of the subject DEED OF TRUST and an accounting.
- ¶ 80 The Plaintiffs are entitled to an accounting of and from Corporate Managers, Credit Depot,

Fairbanks, and Universal for all monies paid to all entities in the subject transaction, including but not limited to a copy of evidence of the payor and payee of each item on the loan closing statement and the source of the mortgage proceeds.

In addition, in the prayer for relief at the conclusion of the second amended complaint, the

Debtors request:

- (c) Royce McNeal, Brent McNeal, Brian Michael Pellissier, James R. Hall, and Craig A. Netterville, Credit Depot Corporation of Georgia, Credit Depot Corporation of Tennessee, Universal Title & Escrow, L.L.C., and Fairbanks Capital Corporation shall forthwith provide an accounting of all monies paid by the Plaintiffs to any person or entity arising from the transaction, including but not limited to a copy of evidence of the payment, including the payor and payee, of each item on the loan closing statement and the source of the mortgage proceeds.

Thus, the only claim made against or relief requested from Fairbanks in the Debtors' second amended complaint is for an accounting.

In its motion for summary judgment, Fairbanks states that it is not the holder of the note evidencing or mortgage securing the Debtors' loan, and that it does not assert a lien on the property that is the subject of the Debtors' complaint. Fairbanks presents the affidavit of Joy Brodowsky-Lines, a Document Control Officer for SPS, which, as noted, was formerly known as Fairbanks. Ms. Brodowsky-Lines avers in her affidavit that "SPS is neither the holder of the note secured by the mortgage, nor the lienholder of record on any property securing the Dixon Loan." She further avers, "The Dixon Loan is held by JP Morgan Chase Bank, formerly known as The Chase Manhattan Bank, as trustee for IMC Home Equity Loan Trust 1998-3." Thus, Fairbanks asserts that it is, as loan servicer, a mere conduit of funds and manager of the Debtors' account evidenced by the note and mortgage. In addition, also as noted previously, Fairbanks attached to its motion for summary judgment the accounting requested by the Debtors. Because it does not hold the lien on the Debtors' property and because it has provided the verified accounting of the Debtors' mortgage loan as

requested, Fairbanks contends that no genuine issue of material fact remains for trial.

In their response to the motion for summary judgment, the Debtors contend that Fairbanks has taken inconsistent positions with regard to its interest in the Debtors' real property such that Fairbanks should not be granted summary judgment and dismissed as a defendant. The Debtors maintain that Fairbanks' filing of an *Objection to Proposed Lien Avoidance* and a *Motion for Relief from Automatic Stay* in the Debtors' main bankruptcy case indicate that Fairbanks claims an interest in their real property. The Court observes, however, that both of those pleadings were withdrawn by Fairbanks. The Debtors further contend that Fairbanks' filing of a proof of claim in the Debtors' bankruptcy case demonstrates that Fairbanks' interest in the Debtors' property is unclear and that it should not be dismissed from the adversary proceeding.

The Court is unpersuaded that the Debtors have raised a genuine issue of material fact such that Fairbanks should be denied summary judgment. The sole claim raised against Fairbanks in the Debtors' complaint is for an accounting, which has been provided. Moreover, although the Debtors maintain that Fairbanks' interest in the property is unclear, Fairbanks has presented affidavit evidence that it is not a lienholder on any of the Debtors' property and that it merely services the Debtors' mortgage loan by collecting payments and otherwise managing the Debtors' mortgage account. The question before the Court is whether, as between the Debtors and Fairbanks, any genuine issues of material fact exist for trial in this adversary proceeding. In that the accounting has been provided and no other claim or request for relief remains against Fairbanks, the Court finds that Fairbanks' motion for summary judgment is well taken and should be granted.

CONCLUSION

Based on the foregoing, the Court finds that the motion for summary judgment filed by Fairbanks is well taken and should be granted and that Fairbanks should be dismissed with prejudice as a defendant.

A separate judgment will be entered in accordance with Federal Rules of Bankruptcy Procedure 7054 and 9021.

SO ORDERED this the 9th day of March, 2006.

/s/ Edward Ellington

UNITED STATES BANKRUPTCY JUDGE